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BOOK REVIEWS

Philip Norton (Ed.), *National Parliaments and the European Union*, London: Frank Cass, 1996. 193 pages. GBP 20.

Roger Morgan and Clare Tame (Eds.), *Parliaments and Parties: The European Parliament in the Political Life of Europe*, Basingstoke: Macmillan Press Ltd., 1996. 364 pages. GBP 45.

Svein S. Andersen and Kjell A. Eliassen (Eds.), *The European Union: How Democratic Is It?* London: Sage Publications, 1996. 267 pages. GBP 39.50.

More or less generalized concern about the democratic character of the Community's political system is of relatively recent vintage, though the notion that the system should conform to some form of democratic ideal is respectably old.

Increasingly bold affirmations of the Community/Union's attachment to democratic principles have heightened, rather than dissipated, the lingering suspicion that perhaps the lady doth protest too much, a suspicion famously held by the judicial authorities of at least one Member States. A view is gaining support that simply strengthening the legislative powers of the European Parliament, to a point where in effect it decides jointly with the Council in particular areas of Community activity, is not sufficient to fill the democratic deficit, and that the national parliaments should therefore be brought in on the act. Though each adopts a different approach, the review volumes all address aspects of the Community's democratic character.

National Parliaments and the European Union is a slim volume, though an equivalent study carried out ten years ago would have been much slimmer; as the editor notes, in this area "the principal spur to institutional change in the 1980s was the publication of the White Paper on the Completion of the Single Market and the enactment of the Single European Act". Institutional change provides the subject-matter of the book, which examines the developing role and procedural infrastucture of the national parliaments in supervising the conduct of European Community affairs, in the light of successive waves of treaty reform.

Following an introduction by the editor on "Adapting to European Integration", the remaining chapters describe the establishment and functioning of European Affairs committees in ten of the first twelve Member States and provide "a view from Brussels". A final chapter proffers a number of conclusions, particularly regarding various options for tackling the democratic deficit, either by strengthening the position of the European Parliament or bringing the national parliaments in from the cold.

Both individually and collectively, the national studies are useful and timely, especially given both the virtual exclusion of "the Community method" from the outer pillars of the European Union and, as Saalfeld notes, the terms of the *Brunner* judgment of the German Federal Constitutional Court. The Italian chapter is singular in focusing more on the problems of implementing Community measures than supervising the government, and places the difficulties of the *Camera dei Deputati* in this regard in the more general context of the political upheavals in that Member State in the 1990s; the explanation provided of the implementation system established by the La Pergola Law of 1989 is particularly welcome. Recent measures to strengthen the supervision of Community matters by the French *Assemblée nationale*, according to Rizzuto, may have wider implications for relations between the executive and the legislature. The *Cortes* appears to show little interest in close supervision of Community affairs, the Belgian and Portuguese arrangments are deemed generally satisfactory, while those adopted by the Mother of Parliaments adjudged "not ... altogether unsuccessful". Most remarkable of all perhaps, though, is the former Market Relations Committee of the *Folketing*, whose strictly oral procedure and exclusion of ministerial advisors ensure, at the very least, that the Minister is thoroughly briefed before he takes the plane for Brussels. That other outside events can influence institutional change is illustrated by Van Schendelen, who describes the *crise de foi* suffered by the Tweede Kamer as a result of "Black Monday" in September 1991, when the progressive draft treaty presented by the Dutch presidency was firmly rejected by the other Member States.

Notwithstanding significant differences in the political cultures and legal frameworks of the Member States, certain common themes emerge from the national studies: a lack and/or surfeit of information on Community matters generally, tardiness of briefings on ongoing Community legislative initiatives, government reluctance to respect even legal requirements in their dealings with their parliaments and a tendency to interpret narrowly the latters' supervisory brief. Not all the difficulties can be laid at the door of the governments: within the parliaments themselves, other sectoral committees may be jealous of the vast scope of the remit of the European Affairs committee, or, alternatively, they may be indifferent to its activities. Similarly, amongst members of certain national parliaments, expertise in the arcane workings of the Community carries a disproportionate level of influence, while in some parliaments, the European committee is considered "unglamorous". This is particularly the case in Ireland, despite the Trojan efforts of Senator (later President) Mary Robinson; there, as O'Halpin observes drily, the committee on foreign policy "offered rather more

scope both for travel and for moralising". Westlake presents a survey of the principal events leading to the declaration on the conference of national parliaments annexed to the Treaty on European Union, and the possible future role of such parliaments in Community matters; despite a rather jaundiced view of the role of the European Parliament before the Single Act, his conclusion that it is now up to the national parliaments themselves, rather than the Community institutions, to act, seems sound.

Parliaments and Parties is an altogether bulkier volume than Norton et al. Neither its title or subtitle,*The European Parliament in the Political Life of Europe*, provide a clear idea of its subject matter. As explained in the introduction, the book sets out to explore three topics: the links beween national political parties and the corresponding political group in the European Parliament, the channels for communication and cooperation between national parliaments and the European Parliament, and the reaction, if any, in national parliaments to resolutions addressed to them by the European Parliament. The ultimate aim is "to give a comprehensive picture of the state of relations between the national and European parliamentary levels". To this end, the situation in each of the first twelve Member States with regard to the three question is examined, with a concluding chapter which draws on interviews with MEPs from across the political spectrum.

While thoroughly covered, it is hard to see the general interest of first question, and few of the contributors succeeded in drawing any general conclusions from their description of the links between national parties and European Parliament political groups. A low level of interest in European matters amongst national MPs was noted in a number of Member States. In France, the absence of highly structured formal links was said not to preclude a strong attachment to European integration, while the existence of such links did not necessarily betoken interest in integration. Giuzzi reports that while the Italian parties adopted the programmes of European political federations for the 1989 European Parliament elections, parties belonging to the same federation did not always present a common list at home. In common with one or two other contributors, he places the matter in a more general political context; even if beyond the strict terms of the contributors' remit, such digressions provided useful background material.

The treatment of the second question inevitably covers some of the same ground as Norton et al., which, for reasons that will appear shortly, is generally more reliable. In answering the third question, the rapporteurs were asked to investigate the national parliaments' reactions to nearly 70 European Parliament resolutions from the years 1984 to 1986. The reactions were more or less nil across the board, with the marked exception of the Draft Treaty on European Union of 14 February 1984; curiously, while the *Bundestag* took almost five years to respond favourably, the *Folketing* took just three months to reject the draft treaty outright.

Parliaments and Parties suffers from one fundamental, though not necessarily incurable, flaw; with one or two honourable exceptions, the national chapters are well beyond their sell-by date. As noted in the preface, the original findings were

reported as early as 1988; the revisions "to take account of the situation and prospects after the EP elections of 1994" are for the most part superficial and unconvincing. The absence of any proper account of the impact of the Treaty on European Union, indeed, the rather limited account of the impact of the Single European Act, seriously undermine the value of the entire volume. A reader buying a book in 1997 should be warned in advance, for example, that the impact of the European Parliament's views in national parliaments is based on resolutions which predate the major institutional reforms of the Community; it is also quite extraordinary that, though mentioned the introduction, the impact of its legislative positions is not examined. It may be true that the conclusions of the study in this regard would be no different, but how is one to know? It is also clearly wrong to think that the European Parliament's "appetite for passing resolutions on all important subjects" has in any way diminished. Notwithstanding its dated look, some of the comments in the concluding chapter, possibly because it does not rely to any meaningful extent on the preceding contributions, are worth reading. It is nonetheless disconcerting to see the Single Act described as "a piece of legislation ... formulated by the European Parliament" (and, if it was distorted by the Council, that was only after it had been adopted by the Member States), and to read that the Commission performs "a tutelary role" as regards the European Parliament thanks in part to "its massive and competent staff".

A second regrettable, and certainly curable, feature of the book is the absence of "the view from Brussels" (or Strasbourg, to be more precise); how can one provide a "comprehensive picture" of the relations between parliaments on the two levels concerned, if there is no presentation of the subject from the perspective of the European Parliament? The series of interviews related in the concluding chapter do not pretend to substitute for a systematic treatment of the matter. Moreover, no explanation is provided as to what a European Parliament political grouping is, what the difference between this and a European party federation might be, and the impact of each on what is grandly dubbed "the political life of Europe". Nor is there any examination of the utility and the concrete results of the various forms of collaboration between the national parliaments and the European Parliament mentioned, such as COSAC, the Conference of Speakers, the Assizes, the admission of MEPs to national committees, and joint meetings of sectoral committees of the national parliaments and the European Parliament.

The book has its flashes of enlightenment and its lighter moments. Steppat reports the importance of the European Parliament as a source of income for national political parties in Germany, while Rebelo de Sousa notes that in Portugal the PSD is more interested in strengthening the government in EC matters than the *Assembleia da República*, a tendancy which must surely be shared with other national political parties. Stronck reports the difficulties the Luxembourg MEPs experience in maintaining contacts with their national political parties, allegedly arising from "MEPs peregrinations between Strasbourg and Brussels"; perhaps he should convey these complaints to MEPs representing, say, southern Greece, northern Finland, the Canary Islands or

the Highlands of Scotland. His comments also ignore the Grand Duchy's historical role in maintaining the "institutional polycentrism" to which he takes exception. Each of the Member States which acceded in 1973 is described, perhaps not implausibly, as a special case. One of the three is referred to as "Britain", whatever that is intended to denote in this context. The same author provides a brief but insightful summary of the differences in the role and functioning of Westminister and the European Parliament, and of the operation of the respective committees of the Commons and the Lords. Whether tongue in cheek or Euro-sceptical in tone, he reports the absence of a Commons debate on "the fateful 1989 Madrid summit at which Stage One of the European Monetary Union was approved", and continues: "Thus, Commons discussion of a host of consequent legislative measures was pre-empted". Quite: "Fog on the Channel – Continent cut off".

Andersen and Eliassen approach the question, boldly put, of the democratic character of the European Union, by examining political structures at both the Community and the national level; they seek to provide an overview, rather than a series of discrete national views. Whereas the other two review volumes are primarily descriptive and/or empirical, *How Democratic Is It?* relies more heavily on the analytical tools of political science theory, in analysing different actors on the Community political scene, national adaptations to Community policy-making, the Community institutions and the future of EU democracy.

Approximately half the book covers institutional matters. Part II demonstrates how national political processes in three Member States (*in casu*, France, Belgium and Italy) have adapted to the extension of the Community/Union's reach. The Belgian chapter, by the late Cecilia Andersen, is particularly strong on the role of the federal units in the conduct of Community affairs, while the other two contributions each bring a different perspective to the situtation in the Member States concerned. The chapters on the Commission and the Council cover familiar ground, in a somewhat uncritical fashion. In her thoughtful, if slightly indisciplined, piece on the European Parliament, Lodge identifies various failings of the institutions to recognize and deal with the question of the Community's democratic legitimacy, including institutional rivalry and lack of cooperation, absence of public confidence and procedural complexity, and suggests some remedial action. The multi-author chapter on "Voting Power Under the EU Constitution", an important and contentious subject, illustrates that the marriage of mathematics and politics can on occasion produce grotesque offspring. Among the choicer offerings are the conclusions that there is no practical difference between qualified majority voting and unanimity, that between 1958 and 1973 Luxembourg had no voting power under the qualified majority vote, that only three political groups had any voting power in the European Parliament in the period 1979 and 1981, and that seats are distributed in the European Parliament according to a complex mathematical formula rather than political bargaining.

The real contribution of Andersen and Eliassen to the debate on democracy is to be found in Parts I and IV and the introduction (which is really more of a conclusion;

the concluding chapter is in turn a summary of the preceding chapters). Recognizing that integration is "a chance and a threat at the same time", Wessels offers a number of possible scenarios for the European Union. In his "Personal View from the Sideline", Gustavsson presents the political agenda in stark terms: "There are more Maastrichts to come, each with more difficult, controversial choices. No quick fix and no easy solutions are available to the problems which lie ahead of [the] EU", particularly the need to identify its very raison d'être. The chapters on lobbying and post-parliamentary governance (Chapters 3 and 13, respectively) put a different perspective on the democracy question; the latter in particular paints an apocalyptic vision of the erosion of parliamentary democracy.

The notion that national parliaments have somehow been entirely left out of Community affairs is as widespread as it is false. Charged, *inter alia*, with supervising the actions of their national governments in the Community domain, including policy-making, policy implementation and Treaty revision, with a few exceptions, they have until recently shown how little interest and less capacity in this regard. In particular, as the review volumes show, most national parliaments have not yet rid themselves of the mindset which classifies Community policy-making as a sub-division of Foreign Affairs, to the eternal convenience of the national governments; until they do so, the case for increasing the current role of national parliament in Community affairs, *a fortiori* through treaty amendment, has not yet been conclusively made, and could even be thought to be a "quick fix" of the kind Gustavsson warns against. The challenge to the democratic legitimacy of the Community, and even more so the European Union, runs much deeper than petty jealousies within national parliaments, and between parliaments at different levels, and touches the very heart of the European enterprise. Unless it is properly identified and resolved, the absence of generally acceptable democratic structures in the European Union could prove to be its downfall.

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Thomas W. Waelde (Ed.), *The Energy Charter Treaty – An East-West Gateway for Investment and Trade* with a foreword by R. Lubbers. London: Kluwer Law International, 1996. 670 pages. NLG 395/GBP 178. including two annexes.

This weighty tome, which appeared after the signing of the Energy Charter Treaty in Lisbon in late 1994, is a very welcome contribution to an important subject. As its sub-title indicates, the book is more than just an analysis of the European Energy Charter and the follow-up Energy Charter Treaty. It also contains detailed and often provoking analysis of the general public and private international law regimes for the protection of investment. It is impossible in a short review to do justice to

each of the 27 contributions to this volume. The authors are drawn from different disciplines, including international and European law, energy law, political science and economics, as well as from all corners of the globe. Some are academics, others practising lawyers or legal advisers to governments and international organization. This makes for a thorough examination of the Charter from a variety of theoretical and practical perspectives.

The Energy Charter Treaty has been acclaimed as the first multi-lateral treaty to cover a single sector: energy. Its aims are bold and its scope is ambitious. It establishes legal rights and obligations with respect to a broad range of investment, trade and other related matters, and provides an innovative regime for their enforcement by States as well as by private parties. Moreover, it is seen by some to be a crucial part of the East-West transition from military confrontation and reliance on NATO to non-military economic competition and integration along European community lines. Given the unique nature of the Treaty as a legal regime, it more than deserves the detailed treatment to which it is subject in this edited volume.

The work is conveniently divided into 6 major parts. Following a concise overview of the Charter and the history of its adoption, Part 1 deals with the Energy Charter Treaty Context. Chapters cover International Oil and Gas Investment in the CIS, Eurasian Energy Politics and Prospects and the Need for a Long-term Western Strategy. Seck looks at the problems of investing in the Former Soviet Union's Oil Industry and asks whether the Charter Treaty can mitigate political risk. These chapters contain fascinating accounts of the political and economic situation in the CIS regime, and although much of the detail may already be history for the present reader, they provide a vital insight into the many risks which face intrepid investors – risks which the Energy Charter Treaty regime must somehow be seen to mitigate if it is to prove its worth. Doubts as to its effectiveness was one of the many reasons which persuaded the United States, and eventually Canada, not to sign the Charter Treaty.

Part 2 focuses on the Charter Process, and opens with a contribution on the negotiations which led to the conclusion of the charter. This informative piece addresses the interests at stake in the drafting process. The remaining authors examine the Treaty's implications for various geographical areas including Russia, Kazakhstan, and the US. There is also a separate "Oil and Gas Industry Perspective". These chapters provide a good overview of the diversity of interests which the Charter process has tried to satisfy. As Fox explains in his chapter, the United States still remains to be convinced that it is in its interests to sign the Charter Treaty.

Legal Antecedents and Structure is the title of Part 3, which concentrates on the implications of the Charter for international law in the realms of trade and investment. This section includes a chapter on the many failed multi-lateral attempts to create an international law regime for foreign investment. It concludes by pondering as to whether the Charter is just another attempt at regime building or whether it represents a new departure in the creation of a liberal international order for trade and investment.

Part 4 examines the international investment regime as regulated by the Charter itself, as well as the relationship between the charter and bi-lateral investment. This section also contains two valuable contributions on arbitration and investment treaties. Chapter 15 contains a detailed legal analysis of international investment under the 1994 Charter Treaty by the volume's editor, Waelde. This thought-provoking contribution assesses some of the problems which will inevitably arise from the superimposition of a public law regime on an area which has traditionally been regulated by private law agreements. Waelde outlines some of the strains which this could impose on the Charter's dispute settlement procedures.

The relationship between the Charter and international trade regulation is the subject of Part 5, and chapters cover the GATT, the WTO, and TRIMS. This Part includes detailed analysis of the new TRIMS agreement and the changes to the GATT regime following the conclusion of the Uruguay round. It is one of the many innovative but complicating features of the Charter that non-GATT members have agreed to be bound by the pre-1994 GATT rules in their relations with one another while GATT members must abide by the post-1994 rules. Some of the difficulties which this could give rise to are examined in Chapters 20 and 21.

Part 6 deals with the more specialized issues of transit, environment and competition – all covered, if somewhat tangentially by the Charter and the Charter Treaty. The Charter's transit provisions are particularly important for the future of East-West trade in oil and gas in Europe. Environmental protection receives only a rather cursory and for some disappointing treatment in the Charter itself. The environmental provisions cannot be the subject of the dispute settlement mechanism, for example. The Charter provisions on competition, originally modelled on Articles 85 and 86 EC were substantially modified in the course of notifications, and have been watered down to little more than a commitment by the contracting parties to introduce effective measures to combat anti-competitive practices. These articles may well warrant eventual review if the Treaty is eventually to take up the mantle of an effective legal regime for the promotion of, and not just the protection of, inward foreign investment.

The final Part 7 turns to questions of implementation and compliance, especially in the light of the so-called provisional regime, under which contracting parties can opt to be bound by the Charter Treaty rules until the instrument is fully ratified. This part also contains useful contributions on the problems of transition for the former CIS countries towards a more market-oriented regime.

As might be expected from such a distinguished set of contributors, this collection is by no means a descriptive account of a novel legal instrument. The detailed and critical analysis to which the Charter is put in the wider context of developments in international trade and investment law – subject areas which have also seen substantial legal development in recent times – should extend the appeal of the book well beyond those whose primary interests are energy-law related.

While not wishing to detract from the overall value of this work, this author was disappointed to find that there was no detailed treatment of the nuclear sector and

the implications that the Charter Treaty could well have for its future development. The issue of nuclear safety has been relegated to an essentially non-binding Protocol, but the substantive provisions of the Charter Treaty could well have important implications for trade in nuclear materials from the CIS countries to the rest of Europe. Similarly, a comparison between the Charter Treaty and the energy and investment provisions of the NAFTA would have been useful.

On a less serious but rather irritating note, the absence of any form of index or list of abbreviations – the usual frills in other words – is also to be regretted. Obviously the inclusion of 27 chapters addressing a global topic can lead to the risk of overlap and repetition of some of the basic information and analysis. This is perhaps less of a problem, given that the editors have not provided any cross-referencing between the chapters.

A common theme running through the legal contributions is their criticism of the Charter Treaty's vague and often conflicting terminology – a feature usually attributed to the fact that it also pursues conflicting aims. For example, on the one hand its Article 18 declares its intention to preserve and guarantee State sovereignty while on the other hand, many of its articles can be interpreted as an attempt to water down that concept. The lack of clarity in the text requires the various authors to speculate as to their meaning and to enter into rather detailed and intricate analysis of the relevant provision in order to extract some meaning from it. This hardly makes for a "light read", but surely such a close reading of the texts is the only way to elucidate some of the legal problems which might prevent the Charter Treaty from being as useful an instrument as its drafters had hoped.

The eventual success of the whole Charter initiative and the follow-up Treaties and protocols which are currently under negotiation will be determined less by the legal deficiencies which permeate the text, and more by the willingness of those companies to finance investment in the former CIS to rely upon it. Nevertheless the Charter must be recognized not only as a bold initiative, but one which was concluded in an extremely short period of time. That such an ambitious instrument was agreed to, drawn up and signed within some three years would seem to underscore the importance that many countries appeared to attach to a stable legal framework for future investment and trade in energy. The Charter Treaty needs a minimum of 30 ratifications before it enters into force, but some two years after its signature this threshold had not been reached. Even if the Charter Treaty itself turns out to be a deadletter, this volume will remain of significance, and not just as a historical account of what one of the contributor's characterizes as over-ambitious regime building.

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A. Caiger and D.A.M.-A. Floudas (Eds.), *1996 Onwards: Lowering the Barriers Further*, Chichester: John Wiley and Sons Ltd., 1996. 307 pages. GBP 50.

This edited collection, combining conference papers with invited articles, aims to restore attention to issues relating to the Single Market. By focusing to a large extent on services, the book highlights substantive areas outside the mainstream question of internal trade in goods. The brief introduction (Floudas) identifies two main themes which provide a loose framework for the chapters which follow. These themes are the conflict between regulation and deregulation (also identified as the conflict between centralization and subsidiarity) and the perceived dichotomy between social policy and market efficiency. Floudas provides a neat overview of the book at the start but the relationship between the themes he identifies and individual chapters is sometimes implicit. It is also surprising to see the question of regulation and deregulation identified as a key theme but without any reference to or discussion of regulatory competition, although this issue is a focus for several of the papers (see Marise Cremona on financial services in particular).

The book is divided into five sections: existing barriers to the SEM; barriers to financial services and capital; freedom of establishment; social policy; and a final section called "completing the scene" where the issues of effectiveness and the relation between the EC and global trade are addressed before a brief conclusion by Caiger. This conclusion returns to the themes raised by his co-editor in the introduction and although such a paper might be useful at the end of a symposium this reader would have found it more useful if they had combined forces to produce a longer introductory paper elaborating on the themes to be discussed.

The first section explores the limitations of the Single Market in that area where it is deemed to have the greatest impact viz. the free movement of goods, through an analysis of foodstuffs (Burrows), public procurement (Bovis) and a case study of Case C-267 & C-268/91 *Keck* and *Mithouard* ([1993] ECR I-6097) (Ross). In a succinct chapter, Burrows argues that Community success in lowering barriers to trade in foodstuffs may be jeopardized by subsidiarity and deregulation because Community regulation of standards is necessary to ensure consumer protection which in turn secures free movement. Bovis examines the compliance directives on public procurement having first provided a general account of both the common market and public procurement. Given the nature of the general discussion, this chapter could have been placed at the start of the section or the experienced reader who will be the main audience for this book, can either use it as a general reminder or move quickly to the more detailed discussion. Ross provides a challenging and insightful analysis of *Keck*. He argues that the reasoning rather than the analysis in the case is a cause for concern seeing it as a judgment of reactive pragmatism rather than long-term, principled policy. By exploring the approach of the ECJ in relation to Article 90(2) he advocates a values-based approach, akin to a rule of reason, in preference to the rules-based approach found in *Keck*.

In the second section on free movement of financial services and capital, Cremona provides an excellent introduction to some of the key themes in this area of Community law. She echoes Burrows' discussion of what is the appropriate level for regulation through a rigorous analysis of the inherent tension between liberalization of financial services and consumer protection. Magliveras' paper on supervision of financial services discusses the post-BCCI and Money Laundering Directives. The discussion of how the former came about is an invaluable case study of the operation of the co-decision procedure. However, the argument he outlines at the start of the paper i.e. that the liberalization of capital transactions and full integration of banking and other financial markets should not compromise the soundness and transparency of the financial system of the Community, is not explicitly addressed later in the paper. Fitchen examines the extent to which current competition policy is able to safeguard and support the internal market in relation to banking. The paper is of interest to those unfamiliar with this market as the key regulatory concerns are first identified before moving to a discussion of Articles 85 and 86 and the Merger Regulation, the discussion of the Regulation in particular being clearly focused. The paper concludes that in the past, banking regulation has been linked to establishment and not competition. This difficulty has been identified by the Commission and Court but has not been effectively addressed.

Fitchen's paper thus leads neatly to the next section on freedom of establishment. Here, in a paper where the author is equally comfortable with the principles of international taxation and EC law, Van Theil convincingly argues that Community law has an impact on traditional rules of international taxation in part through an analysis of the Community non-discrimination principle and its application to tax rules based on residence. This chapter overlaps a little with that by Mortimer who looks at the case law of the European Court on establishment rights for companies.

In the next section, the book changes gear with discussion of a specific policy area – social policy. Barnard and Deakin, in an excellent paper, argue that the role of social policy should be to support and compliment social regulation at the level of the State and not to displace it in favour of a set of uniform rules. Using an historical perspective they argue that the Community could provide a floor of rights. They challenge the perception of social policy as a barrier to economic development and give a qualified welcome to the conferral of constitutional status on social rights in the Community. This paper is followed by two related papers on Europe and the UK employment market which draw on the same empirical research project on employee involvement in East Anglia. Leighton argues in a short paper that despite the British opt-out there are radical changes emerging in the UK employment law, its shape being influenced by the ideas which underpin the European employment law agenda. Welch's paper on the European Works Councils Directive is a reflective piece offering a fuller account of the research on which both writers rest their arguments.

Finally, in the last section, Weatherill writes on the development of national remedies looking at the phenomenon of dual vigilance – enforcement of Community law

in the courts at the supra-national and national level. The paper is a good example of how an academic can predict with some accuracy subsequent developments of the law, the paper being written before the *Brasserie du Pecheur*, *Hedley Lomas* and *British Telecom* judgments were handed down. The paper neatly addresses the issue of the effectiveness of EC law and its conclusion discusses the lowering of barriers to integration, thus helping to complete the scene. In a paper devoted to NAFTA, Rojas-Lopez provides a scholarly and detailed description of NAFTA, in particular of its rules on services, agriculture and rules of origin although he could have addressed more closely its stated aim of looking at how NAFTA is going to effect the Community.

The book is adequately indexed with a comprehensive list of tables. Only the official case reports references are given but they are listed both by number and alphabetically. The use of gender neutral language by most of the authors is welcome but in those chapters where it is absent the oversight grates on readers aware of the importance of language in reinforcing or challenging stereotypes. The book realizes its primary objective of raising awareness of the ongoing barriers to economic integration at a time when the Single Market is "old hat" in the market of big ideas where Maastricht, EMU and Maastricht II now command attention. The editors are to be applauded for bringing together papers on social policy and financial services, capital and tax in a single volume and for adopting an inclusive approach encompassing (high quality) papers from doctoral students and well-established academics.

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T. Hervey and D. O'Keeffe, *Sex Equality Law in the European Union*. European Law Series. Chichester: John Wiley & Sons, 1996. GBP 50. ISBN 0-471-96436-0.

This book originated in a conference organized by Trier Academy of European Law and the Centre for the Law of the European Union in London in March 1995. However, what has been published is much more interesting than listening to some of the speakers. Furthermore, the book contains not only the papers given on this occasion, but chapters which other specialists in the area have been invited to write.

The book proposes to "represent a new contribution to scholarship on the subject of the European Union's legal regulation of sex discrimination, and the contribution of the law of the European Community and Union to the position of women and men in the Member States." The editors intended the book to have as wide a coverage as possible and this objective is certainly achieved. The book covers traditional issues such as Equal Pay, Equal Treatment, Social Security and the difficulties surrounding enforcement of sex equality based claims. It also explores "the gendered perspectives

of rights which inhere in individuals within the Union such as Citizenship and human rights, women and the Internal Market". It finally concludes with a "Perspectives on Sex Equality Law: Proposals for Reform."

As is the nature with this type of publication, the book lacks any real cohesion between its different parts. The authors have all approached their specific topics from very different angles and levels, and also with varying degree of success. Alongside different types of legal scholarship, there are different qualities of legal scholarship. The papers range from highly academic, very interesting and worthwhile pieces or quite technical papers to attempts at legal theory, some of which are rather "too general for the specialist or too specialized for a generalized public", if not quite disappointing. Whilst it is of course difficult to obtain consistency with regard quality, a more helpful approach may have been to follow through the pattern adopted in relation to equal treatment i.e. to have one or two sets of issues dealt with from different perspectives. For example, equal pay and equal treatment from a legal perspective and from a legal theory perspective.

The book is certainly not going to find its place on lawyers' office shelves, for with a few exceptions, there is precious little law in it, and even at times some basic misunderstandings about, for instance, the nature of preliminary rulings. Indeed some authors pose a rather onerous duty on the Court, expecting it to be able to balance satisfactorily all the factors they would like to see taken into account within the context of primarily Article 177 references, where the Court's views are likely to be influenced by the narrow position of the particular events before it. However the book will find a place among the ever expanding "new approach" to the subject of European integration which seems to dominate legal scholarship in the U.K. at present. Certainly the marriage between legal and political science encourages reflections about the connections and continuities between EC employment law and policy and other areas of Community involvment. Perhaps it is a good idea for lawyers too to get involved in the debate about whether or not the Union can live up to its expectations of developing into a fully fledged political entity.

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Stefan Rating, *Mittelbare Diskriminierung der Frau im Erwerbsleben nach europäischem Gemeinschaftsrecht. Richterrecht des EuGH und die Voraussetzungen seiner Rezeption am Beispiel Spaniens und der Bundesrepublik*, Baden-Baden: Nomos Verlagsgesellschaft (Nomos Universitätsschriften), 1994. 276 pages.

Christian Blomeyer, *Das Verbot der mittelbaren Diskriminierung gemäss Art. 119 EGV. Seine Funktion im deutschen Arbeitsrecht*. Baden-Baden: Nomos Verlagsgesellschaft (Schriftenreihe Europäisches Recht, Politik und Wirtschaft) 1994. 140 pages. DM 44.

The two books under review, both German Ph.D. theses, discuss certain aspects of the interesting and problematic notion of indirect discrimination on grounds of sex.

Blomeyer's book on the prohibition of indirect discrimination under Article 119 EC makes very agreeable and interesting reading. Well structured and written in a clear language (by no means something to be taken for granted in German legal writing), the book aims at examining the function of the concept of indirect discrimination under Article 119 in the context of German labour law. The author explains in the introduction that this function is unclear because the legal notion of indirect discrimination itself is to a large extent not defined and therefore vague. The book is divided in seven major parts. In a first part, the author discusses the prohibition of indirect discrimination under Article 119 EC and in a second part the German Federal Labour Court's case law with regard to this prohibition. Parts three to five discuss the function of the prohibition of indirect discrimination according to, respectively, the case law of the European Court of Justice on Article 119 EC, the case law of the Court on indirect discrimination under Article 6 EC, and finally – very briefly – the case law of the U.S. American Supreme Court on "adverse impact". Part six then returns to Community law and its function in Community law. In part seven the author explains why he considers the prohibition of indirect discrimination under Article 119 EC as a rule of evidence rather than anything else.

Rather more difficult to read is Rating's book on indirect discrimination of women according to the case law of the Court of Justice and with regard to its implementation in Spain and Germany. It might be called a book of surprises. First, different from what the title indicates, rather than focusing on indirect discrimination, the book seems to discuss sex equality law in a much wider sense. After an introduction (which does not deal with indirect discrimination), the first and biggest part discusses Community law on sex equality, that is, what the author calls "provisions of positive law". Surprisingly, this includes issues of Community law such as the direct effect of directives (and here even a subtitle on Member State liability), flanking measures by the Commission in the area of sex equality policy, and the role of the European Parliament. As of p. 53, the book deals specifically with "indirect discrimination of women". The author discusses the ECJ's case law (some not about indirect discrimination), defines various kinds of discrimination and describes the elements of the concept of indirect discrimination. In the following two parts of the book, the author describes German and Spanish sex equality law. In the conclusion, the author points out the similarities and the differences of the three legal orders with regard to sex equality law on equal pay. He points out differences with regard to the notions of pay and equality of work, and mentions shortcomings of Spanish law with regard to adequate provisions on indirect

discrimination and with regard to the application of provisions on sanctions. At the end of the book there are helpful annexes with the relevant German and Spanish legislation. Further, there is a literature list of more than 50 pages (reflected in almost 900 footnotes – some of which perhaps may be described as unnecessary surprises).

Both books have to be seen against the background of German national (case) law on sex discrimination, especially indirect discrimination. This becomes evident when the authors try to formulate definitions of the notion of discrimination in general and of indirect discrimination specifically. Both Blomeyer and Rating distinguish between "unmittelbare" (direct), "verdeckte" (disguised) and "mittelbare" (indirect) discrimination. However, the fact is that EC law as it stands only knows the two notions of direct and indirect discrimination. The notion of "versteckte Diskriminierung" which in German law is defined by the intent to discriminate on grounds of sex while using an apparently sex-neutral criterion, is irrelevant in EC law for the simple reason that the intent of the discriminator is irrelevant in EC law. A further point specific to German law are the elements necessary for finding indirect discrimination. According to German law, these include the requirement that the discrimination must be based on sex or the sex-role of the relevant group of persons (as the German Federal Labour Court puts it: "wenn die nachteiligen Folgen auf dem Geschlecht oder der Geschlechtsrolle beruhen"). Blomeyer points out that the latter element (sex role) cannot be found the ECJ's case law. (In addition, I would submit that even the first element cannot be found in the way the German court puts it. The ECJ's formulation is a negative one: "where that measure could not be explained by factors which exclude any discrimination on grounds of sex" and "if the practice may be explained by objectively justified factors unrelated to any discrimination on grounds of sex" – case 170/84 *Bilka* [1985] ECR 1607, paragraphs 29/30. A positive formulation does not necessarily mean the same thing as a negative one. Such reformulations might be dangerous.)

It is interesting to note the different appraisal of German law on indirect discrimination in the context of Article 119 EC by Blomeyer and Rating. Blomeyer finds – as far as I can see, correctly – that German law is not in line with EC law. Rating on the other hand explains that the German courts do follow the case law of the ECJ, while it is Spanish law that does not adequately address indirect discrimination. Blomeyer's assessment of German law leads him to a very interesting conclusion with regard to the function of the concept of indirect discrimination. He criticizes the German Federal Labour Court for construing the prohibition of indirect discrimination as a rule of substantive law which leads to the possibility and the problems of justification. According to Blomeyer, the reason for this is that in German law the prohibition of indirect discrimination is seen as a social policy provision, aiming at preventing detrimental treatment of female workers which might occur from their unequal situation in life. Blomeyer thinks that the construction as a substantive rule is contrary to Article 119 EC. Analysing the ECJ's case law and the origins of Article 119, Blomeyer comes to the conclusion that the aim of Article 119 is not to com-

pensate for "social deficits". Such rules would have to be adopted in the context of Articles 117 and 118. Therefore, according to Blomeyer, the prohibition of indirect discrimination in the context of Article 119 is not a social policy rule, but rather a procedural rule aiming at regulating the burden of proof (that is, making it easier for the person claiming to have suffered indirect discrimination). The author thinks that seeing the prohibition on indirect discrimination in the context of Article 119 in this way, the above-mentioned problems in German law can be avoided. Personally, I quite agree that there is a procedural element in the present case law on indirect discrimination (namely in so far, as it is for the alleged discriminator to prove that the different treatment "can be explained by objectively justified factors unrelated to any discrimination on grounds of sex"). However, I do not think that this makes the prohibition a mere procedural rule. In EC law, the notion of indirect discrimination has to be seen in a wider context than just sex equality: as Rating points out, the concept of indirect discrimination has been developed not in sex equality law, but rather in the context of the four freedoms. Blomeyer himself admits (referring to case 152/73 *Sotgiu* [1974] ECR 153) that there the issue has always been to prevent the avoidance of discrimination rules by simply basing different treatment on another that the prohibited criterion which then leads to the same discriminatory result. In my opinion, the concept of indirect discrimination needs to be seen as an expression of the principle "substance prevails over form". This is in line with legal theory on the issue: indirect discrimination is usually seen as an element and an expression of substantive equality. This concept of equality aims at "equality of outcome" and is therefore of a substantive (and not merely procedural) nature. I would submit that the prohibition of indirect sex discrimination needs to be understood as a substantive rule.

Finally, I am not quite sure what Rating thinks about the usefulness of the prohibition of indirect discrimination. In the introduction to his thesis he simply mentions that the detrimental situation of women in the area of paid work is "not (only) caused by discriminatory practices". Considering the problem of structural discrimination, that assessment is – unfortunately – correct. However, I do not agree with Rating's conclusion that the situation of women cannot be substantially bettered by the prohibition of (indirect) discrimination. As a substantive rule, this prohibition forms an essential part of a useful strategy to fight discrimination on grounds of sex. But then it needs to be complemented by other measures such as positive action in favour of women – which is, different from what AG Tesauro writes in his opinion on the case C-450/93 *Kalanke* [1995] ECR I-3051, also an aspect of substantive equality.

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Nicholas Michel, *Les marchés publics dans la jurisprudence européenne: Exposé systematique des arrêts et ordonnances de la Cour de justice des Communautés européennes*. Contributions du Séminaire pour le droit de la construction (Series editors Peter Gauch and Pierre Tercier). Fribourg: Editions Universitaires Fribourg Suisse, 1995. 147 pages. FF 136. ISBN 2 8271 0712 0.

The contents of this book are very accurately expressed in its subtitle. It is a systematic exposé of the judgments and orders rendered by the Court of Justice in the procurement field up to May 1994. The author has analysed the various decisions and cites in full the paragraphs relevant to the headings into to which he has divided the book. The value of such a work depends, of course, on the extent to which the author can "add value" to the raw text of the judgments and orders, which the reader could otherwise find perfectly happily in the European Court Reports.

The occasional introductions or commentaries accompanying the citations do not contain any substantial appreciation of the jurisprudence. But tables are provided enabling the reader to locate a judgment or order by date of judgment, case number or by the name of one of the parties. A list of the various procurement directives, and a table showing the relationship between the provisions of the new supplies and works directives and the old (reprinted from the Official Journal), are also provided. More usefully, tables are given showing where the various provisions of the EC Treaty or the directives are cited in the judgments.

The core value of the book does not, however, derive from the commentaries or the tables, but the way in which the author has broken down the judgments and orders by subject-matter. The book has two sections. The first deals with the fundamental treaty rules (equal treatment, free movement of goods, workers and services, freedom of establishment and the State aid rules) and Court procedure (infringement actions, Article 177 references and interim measures). The second deals with the procurement directives as instruments of Community law (for example, the obligation to transpose into national law) and then in terms of their content.

Two weaknesses appear immediately. First, there is very little in the fundamental treaty rules, Court procedure, or the law on directives, that is specific to the procurement field. These matters have been included in the book because they happen to have been dealt with in judgments concerning procurement. To give an example, a procurement measure which discriminates in favour of a particular region of a Member State may violate Article 30 (*Du Pont de Nemours*), but to understand fully the law on procurement rules that may be viewed as discriminatory and contrary to Article 30 requires more than a detailed study of Article 30 cases deriving from procurement incidents: all relevant Article 30 cases must be considered. Likewise, the conditions for the grant of interim measures in infringement actions in the procurement field cannot properly be understood simply by examining past procurement cases: the rules are generally applicable.

The second weakness is the lack of selectivity in the citations. It is not very useful, for example, to be presented with a citation consisting solely of a reference to the terms of Article 186 EC, or of a finding that, by not adopting national legislation within the time limit laid down, a Member State had infringed a directive.

All this having been said, the fifty pages dealing with the content of the procurement directives are very interesting indeed. The author methodically presents the various aspects of procurement procedure that have so far been litigated before the Court of Justice in a way which will greatly facilitate quick research. Of particular value are the citations of unsuccessful arguments: it is always useful to know which avenues have already been closed off.

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